

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

January 23, 2001 Session

**STATE OF TENNESSEE v. DEBORAH BROWN SMITH**

**Interlocutory Appeal from the Criminal Court for Hamilton County**  
**No. 228493     Douglas A. Meyer, Judge**

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**No. E2000-01222-CCA-R9-CD**  
**April 12, 2001**

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The defendant, Deborah Brown Smith, was indicted for theft of property under \$500. See Tenn. Code Ann. § 39-14-103. The district attorney general's office denied her application for pretrial diversion and the trial court, denied the defendant's petition for writ of certiorari. We affirm the judgment.

**Tenn. R. App. P. 9; Judgment of the Trial Court Affirmed.**

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Jerry H. Summers, Chattanooga, Tennessee, for the appellant, Deborah Brown Smith.

Paul G. Summers, Attorney General and Reporter; Patricia C. Kussman, Assistant Attorney General; Rodney C. Strong, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The defendant was charged with theft as the result of an incident captured on videotape at the Parisian department store in the Hamilton Place Mall on March 13, 1999. The defendant applied for pretrial diversion. In the letter denying the application, an assistant district attorney summarized the basis for the charge:

[T]he defendant [was] . . . by herself . . . carrying a red Parisian[] shopping bag. She ha[d] a pair of blue slacks draped over her arm . . . [and] a blue plaid blouse underneath the . . . slacks. Both of these items [were] on hangers. She pick[ed] out a black dress and place[d] it on her arm as well . . . then [went] into the dressing room . . . .

After she return[ed] from the dressing room, the blue plaid blouse [was] no longer visible. The defendant . . . place[d] an empty hanger back on a rack. She then hand[ed] the dress to a nearby clerk and . . . [went] to a register.

[A]t the register, [the defendant] reach[ed] into the red Parisian[] shopping bag . . . search[ed] through [it] and pull[ed] out an item . . . in a plastic bag and on a hanger . . . . She [made] [an] exchange. The clerk hand[ed] her a blue Parisian[] shopping bag for the black dress . . . [and the defendant] place[d] the hanger and plastic bag from the item she [had] returned into the blue . . . bag.

When [the defendant] [got] downstairs, she . . . search[ed] through the red Parisian[] shopping bag again . . . [and] approach[ed] another register. . . . She pull[ed] a plastic bag out of the red . . . shopping bag . . . [and] the interior of the red . . . shopping bag [was] revealed to the camera. . . . [T]he blue plaid blouse [could be clearly seen] in the red . . . shopping bag. The defendant [then] [made] another return . . . and exit[ed] the store without paying for the blue plaid blouse. . . .

[T]he dressing room the defendant used on that occasion was checked and no items were found . . . .

The blouse was valued at \$98.

At the time of the charge, the defendant was the principal of Westview Elementary in Chattanooga, approximately 45 years of age, and married with no children. She had never been charged with or convicted of any other offense. As a part of her application for diversion, the defendant offered to pay the balance of her Parisian account within six months, to refrain from obtaining further credit with the company, and to avoid future visits to any Parisian store in the Hamilton County area. The defendant also agreed to waive any right to sue Parisian for false arrest, malicious prosecution, or any other civil remedy to which she might be entitled.

On October 25, 1999, an assistant district attorney denied the defendant's request for pretrial diversion. In the detailed nine-page letter of denial, he cited the following considerations:

1. The need for general deterrence: Shoplifting accounts for the loss of nine to 11 billion dollars nationally per year and accounts for roughly 35% of all losses suffered by merchants.
2. The circumstances of the offense: The videotape of the offense reveals that the defendant's actions were deliberate and intentional.
3. The defendant's amenability to rehabilitation: The defendant refuses to accept responsibility for the offense, which is an integral part of rehabilitation.
4. The need for specific deterrence: The defendant has approximately \$45,000 of credit card debt, creating a strong incentive to steal again.

5. The defendant's lack of previous arrests and convictions: Although the defendant has no prior convictions, she has been involved in at least one prior shoplifting incident. The incident, which is on videotape and was viewed by the assistant district attorney, occurred on February 15, 1999, at the Hamilton Place Mall Parisian and involved circumstances similar to those of the charged offense.
6. The defendant's work history: The defendant has been a good educator.
7. The defendant's position in the community: As the principal of an elementary school, the defendant was a role model for children. The offense was a violation of this public trust.
8. The defendant's reputation in the community: Letters of support submitted by the defendant spoke favorably of her work record and reputation in the community.

The assistant district attorney afforded great weight to the first, second, third, and seventh factors. He considered the need for specific deterrence and the prior shoplifting incident to "weigh against" the defendant's request. While he viewed the defendant's lack of prior arrests and her work history and reputation in the community as favorable factors, he concluded that those factors did not "outweigh the community's interest in deterrence." The rationale for denial was summarized as follows:

Based upon all the information that was presented to me for consideration and the weight to be given the above factors, I feel it is necessary to deny [the defendant's] request for Pre-Trial Diversion pursuant to TENN. CODE ANN. 40-15-105. Overall the reasons that weigh heaviest in the denial of diversion are the need for general deterrence of other criminals, the need for specific deterrence of [the defendant], the unwillingness of the defendant to accept responsibility, and the violation of the public trust bestowed upon her.

The defendant sought review of the denial by petition for writ of certiorari. After a hearing, the trial court determined that the office of the district attorney had not abused its discretion by denying the pretrial diversion request:

[B]ased on the proof I've heard, the State could have granted diversion or denied diversion, and if the record will support either a grant or a denial, the trial court must defer to the prosecutor's decision.

So in this case, I will have to deny the petition for writ of certiorari. There are adequate facts in the record to support [the] denial of pretrial diversion.

The Court did watch both videotapes and both of them appear to be about the same, the one in which she was later arrested, and then the earlier one, which there was no arrest. It does show a pattern of her activity in the store.

As I said, it's not a violation of public trust. I think really what it is, is when a principal or someone in that position does something of this nature, . . . it destroys the public image. . . . [S]o it's the public image, not a public trust.

Pretrial diversion authorizes a district attorney general to suspend prosecution against a qualified defendant for a period of up to two years. Tenn. Code Ann. § 40-15-105(a)(1)(A). A defendant who is statutorily eligible for pretrial diversion is not presumptively entitled to the program. Whether a qualified defendant receives a grant of pretrial diversion is discretionary with the district attorney. State v. Hammersley, 650 S.W.2d 352, 353 (Tenn. 1983); State v. Carr, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993).

In making the initial determination upon a request for diversion, the district attorney general should consider (1) the circumstances of the offense; (2) the defendant's criminal record; (3) the defendant's social history; (4) the defendant's physical and mental condition; (5) the deterrent effect of punishment upon other criminal activity; (6) the defendant's amenability to correction; (7) the likelihood that pretrial diversion will serve the ends of justice and the best interests of the defendant and the public; and (8) the defendant's "attitude, behavior since arrest, prior record, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement." State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993) (quoting State v. Markham, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988)).

A denial of pretrial diversion must be in writing and must include "an enumeration of the evidence that was considered and a discussion of the factors considered and weight afforded each." State v. Pinkham, 955 S.W.2d 956, 960 (Tenn. 1997). In State v. Brown, this court provided three reasons for requiring a written response:

First, the statement would compel the prosecutor to think about and justify his denial in terms of the applicable standards. Second, the statement of reasons would define the area of controversy at the evidentiary hearing. Finally, the statement of reasons would restrict the prosecutor to a particular rationale and insure that the prosecutor would offer no new reasons at the evidentiary hearing.

700 S.W.2d 568, 570 (Tenn. Crim. App. 1985). There must be "more than an abstract statement in the record that the district attorney general has considered these factors." State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989). The factors considered "must be clearly articulable and stated in the record . . . ." Id. While the defendant has the burden of demonstrating his suitability for diversion, that does not relieve the district attorney of the obligation to examine all relevant factors. Id.

The district attorney should identify any areas of factual dispute. Brown, 700 S.W.2d at 570. The circumstances of the case and the generalized need for deterrence, when relied upon by the district attorney, "cannot be given controlling weight unless they are 'of such overwhelming significance that they [necessarily] outweigh all other factors.'" Washington, 866 S.W.2d at 951 (quoting Markham, 755 S.W.2d at 853) (emphasis in original). Where there are no "such exceptional circumstances, 'the district attorney general must consider evidence which tends to show that the applicant is amenable to correction [by diversion] and is not likely to commit further criminal acts.'" Id. (quoting Markham, 755 S.W.2d at 853). "The decision of a district attorney general granting or denying pretrial diversion to an accused is said to be 'presumptively correct'; and the decision should not be set aside unless there has been a 'patent or gross abuse of prosecutorial discretion.'" State v. Perry, 882 S.W.2d 357, 360 (Tenn. Crim. App. 1994) (quoting Pace v. State, 566 S.W.2d 861, 870 (Tenn. 1978)).

When an application for pretrial diversion has been denied by the district attorney, the defendant may appeal to the trial court for a writ of certiorari. Tenn. Code Ann. § 40-15-105(b)(3). The trial court may only consider the evidence considered by the district attorney general. State v. Winsett, 882 S.W.2d 806, 810 (Tenn. Crim. App. 1993). After first determining whether the defendant is eligible for diversion, the trial court may conduct a hearing to resolve any factual disputes between the state and the defense but may not hear evidence not considered by the district attorney. Pinkham, 955 S.W.2d at 960.

In order for the trial court to grant relief to the defendant, the record must show an absence of any substantial evidence to support the denial of pretrial diversion by the district attorney. If the preponderance of the evidence supports the decision of the trial court, the judgment must be affirmed on appeal. Pinkham, 955 S.W.2d at 960; State v. Lutry, 938 S.W.2d 431, 434 (Tenn. Crim. App. 1996).

In State v. Curry, 988 S.W.2d 153, 158 (Tenn. 1999), a case in which a City of McKenzie clerk had embezzled \$27,000 over a three-year period, our supreme court reversed a district attorney general's denial of pretrial diversion because the district attorney had relied almost solely on the circumstances of the offense:

Although the prosecutor asserts that he had "carefully reviewed the application and the attached letters, the denial does not discuss the defendant's favorable social history, lack of criminal record, and potential for rehabilitation. Moreover, assuming these essential factors were, in fact, considered, there is no explanation as to how much weight they were afforded and no rationale as to why they were outweighed by the other factors in denying diversion.

Thereafter, in State v. Norman Jeffrey Pipkin, No. W1998-02738-CCA-RM-CD (Tenn. Crim. App., at Jackson, May 24, 2000), which was remanded to this court for reconsideration in light of State v. Curry, this court observed as follows:

[In State v. Curry,] our supreme court cautioned that while the circumstances of the offense and the need for deterrence may alone justify denial of diversion, that is so "only if all of the relevant factors have been considered as well." In several cases, this court has ruled that the nature and circumstances of an alleged offense are not only an appropriate factor to be considered upon application for diversion, but also may alone provide a basis for denial. It is important, however, to recognize that practically every criminal case is serious, and that only an analysis of all relevant factors, favorable and otherwise, assures proper consideration of an application for pretrial diversion. In Curry, our supreme court complimented the district attorney who had appropriately denied diversion in Pinkham because he had "extensively discussed the relevant factors, identified the evidence considered, and set forth the weight afforded to each factor as well as the rationale for his conclusion." In Curry, . . . [o]ur high court observed as follows:

There was no apparent consideration given to the defendant's lack of criminal record, favorable social history, and obvious amenability to correction. Moreover, the prosecutor did not articulate or state why those factors that were considered, i.e., seriousness of the offense and deterrence, necessarily outweigh the other relevant factors. The evidence presented is a close case on the diversion question; however, the failure by the prosecutor to consider and articulate all of the relevant factors constitutes an abuse of discretion. . . . Finally, we also conclude that the Court of Criminal Appeals erred in remanding the case for an evidentiary hearing in order for the prosecutor to "fill in the gaps" and correct any deficiencies in the record. First, the procedure adopted by the Court of Criminal Appeals decreases the importance of the written response and increases the risk that new reasons or considerations will be introduced during the hearing without notice to the defendant. Second, the standards of review governing certiorari proceedings require the trial court to consider only that which has already been considered by the prosecutor.

In our view, the decision in Curry clarifies and perhaps extends the degree of analysis required by the district attorney general in consideration of an application for pretrial diversion. Careful consideration must be given to the "defendant's lack of criminal record, favorable social history, and obvious amenability to correction."

Slip op. at 7-8 (citations omitted).

It is our view that in this case, the trial court properly determined that the assistant district attorney had erroneously classified the alleged offense as a violation of public trust. While the general public expects and deserves an exemplary standard of conduct from its school administrators, the alleged offense is not related to the defendant's position as an elementary school principal and

did not, therefore, qualify as a breach of public trust. See State v. Kissinger, 922 S.W.2d 482 (Tenn. 1996) (holding that abuse of position of private trust enhancement factor is applicable where offense involves exploitation of relationship promoting vulnerability); State v. James M. Lane, Jr., No. E-1999-00615-CCA-R9-CD, slip op. at 5 (Tenn. Crim. App., at Knoxville, June 1, 2000) (holding that acts unrelated to the defendant's duties as a public employee were not proper basis for imposing a higher standard of conduct and thereby justifying a denial of pretrial diversion).

Furthermore, the assistant district attorney also failed to establish a compelling reason for denial based upon general deterrence. That shoplifting, on a national basis, accounts for the loss of nine to 11 billion dollars per year, that merchants generally mark up prices 10 percent to account for losses they suffer, and that shoplifting accounts for roughly 35% of all merchant losses does not establish a special need for deterrence in Hamilton County. In addressing the role of general deterrence relative to the grant or denial of probation, our supreme court recently held that the relevant consideration is whether there is "a need to deter similar crimes is present in the particular community, jurisdiction, or in the state as a whole." State v. Hooper, 29 S.W.3d 1, 10 (Tenn. 2000); see also State v. Fields, \_\_\_ S.W.3d \_\_\_, No. E1998-00388-SC-R11-CD (Tenn. Jan. 19, 2001). In our view, the same rationale would apply in a pretrial diversion case. Standing alone, reliance upon national statistics would be insufficient to support his finding of a need for general deterrence.

There were, however, other reasonable grounds that would tend to support the denial. The circumstances of the offense, the defendant's amenability to rehabilitation, and the need for specific deterrence were all cited as grounds for denial. Here, the circumstances of the offense were not "of . . . overwhelming significance" and, while appropriate for consideration, were not entitled to controlling weight. See Washington, 866 S.W.2d at 951. The defendant's amenability to rehabilitation and the need for specific deterrence were also properly considered and weighed by the assistant district attorney in the context of the positive qualities of the defendant. Relying on State v. Lewis, 978 S.W.2d 558 (Tenn. Crim. App. 1997), the defendant argues that her failure to admit guilt should not preclude diversion. The record reflects that the defendant sought psychological counseling subsequent to her arrest, but, from the content of the report, was not entirely candid with her counselor. The defendant informed the counselor that she "felt that she had gotten into this predicament due to carelessness and lack of attention." Likewise, letters of reference submitted by the defendant in support of her request for diversion characterized the charges against the defendant as a "mistake" and referred to the defendant's situation as "unjust." The assistant district attorney properly inferred from these documents that the defendant had failed to accept full responsibility, thus indicating a less than ideal rehabilitation potential. See State v. Zeolia, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996). Although the defendant had no prior criminal offenses, the record supports the assistant district attorney's determination that this was not her first involvement in shoplifting. The videotape indicated that the defendant committed a nearly identical offense at the same store less than one month before the subject offense. Prior criminal behavior is a proper consideration. In the context of the enormity of the defendant's credit card indebtedness, the allegations in this instance are of a particular concern. See State v. Beverly, 894 S.W.2d 292, 293 (Tenn. Crim. App. 1994) (noting that the trial court's discretion regarding judicial diversion is subject to the same constraints as that of prosecutors' discretion regarding pretrial diversion and affirming

the trial court's denial of judicial diversion based upon the defendant's prior criminal behavior of marijuana use). Thus, there is evidence to support the contention of the state that the assistant district attorney did not abuse his discretion in determining that the defendant, while meeting all of the basic qualifications for pretrial diversion, was not an ideal candidate for rehabilitation.

By all appearances, the defendant is a respected educator, having spent over 20 years as a teacher and principal in the Hamilton County Schools. The letters of support speak well of her standing in the community. Moreover, perhaps due to its pervasive nature, shoplifting is not typically considered a serious crime. Certainly, the amount of the theft in this instance was minimal, particularly so in comparison to other theft crimes typically reviewed by this court. The lack of any prior criminal record and a distinguished professional career marked by service to the public are very favorable considerations which would easily support the largesse of a pretrial diversion program. "When reviewing a denial of pretrial diversion, [however,] this [c]ourt may not substitute its judgment for that of the district attorney[] even if we would have preferred a different result." State v. Skidmore, 15 S.W.3d 502, 507 (Tenn. Crim. App. 1999). A counseling program marked by some acceptance of responsibility or a record devoid of any prior criminal activity might have yielded a different result for the defendant. Yet our role is limited to insuring that the district attorney considered all relevant factors and had a reasonable basis for denial.<sup>1</sup> In this instance, the state met the minimum threshold for denial.

Accordingly, the judgment of the trial court must be affirmed.

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GARY R. WADE, PRESIDING JUDGE

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<sup>1</sup>The defendant has submitted a summary of Hamilton County pretrial diversion cases during the term of the present district attorney general and asserts that it shows a pattern of discriminatory conduct. The district attorney's prior record of granting or denying pretrial diversion, however, is not a factor to be taken into consideration. See Washington, 866 S.W.2d at 951.